
No. 15-CA-184006

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VELOX EXPRESS, INC.,

and

JEANNIE EDGE.

BRIEF OF *AMICUS CURIAE*
AMERICAN TRUCKING ASSOCIATIONS, INC.

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IDENTITY AND INTEREST OF AMICUS CURIAE

American Trucking Associations, Inc., (ATA) is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences, and was created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 1,800 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation. ATA regularly represents the common interests of the trucking industry in courts and agencies throughout the nation.

Independent contractors play a crucial role in the trucking industry, by helping to efficiently align freight-hauling capacity with fluctuations in demand. The novel NLRA violation created in the decision below would create a new category of risk for any motor carrier seeking to engage the services of an independent owner-operator, and thus would constitute a massive incentive against independent contractor relations in the trucking industry—to the detriment of carriers, independent owner-operators, and the broader national economy. As a result, ATA

and its members have an acute interest in the outcome of this matter.

ARGUMENT

In the trucking industry, the use of “owner-operators”—independent businesspersons who contract their services and lease their motor vehicle equipment to trucking companies pursuant to 49 U.S.C. 14102 and related regulations set forth at 49 C.F.R. § 376—is widespread and economically crucial. For decades, independent owner-operators, who drive their vehicles or employ others to drive them, have been widely used by trucking companies to meet fluctuations in demand, provide needed equipment at considerable cost savings, and address longstanding shortages of experienced operators. In addition, a number of trucking companies have structured their business models around the use of independent contractors, recognizing that the experience, maturity, energy, and initiative of the independent owner-operator can be harnessed to the mutual benefit of trucking companies and contractors alike. This synergy, in turn, benefits the broader economy, as shippers and consumers take advantage of a productive trucking industry to efficiently move the goods they depend on.

ATA endorses the arguments offered in the *amicus* brief filed by the Coalition for a Democratic Workplace and Chamber of Commerce of the United States of America (each of which ATA is a member of), explaining how the decision below erred in adopting the former General Counsel’s novel theory that misclassifying a worker, standing alone, violates Section 8(a)(1) of the National Labor Relations Board. Rather than repeat those arguments, ATA submits this brief to explain the crucial role independent contractors play in the trucking industry, and how the “misclassification-as-violation” theory will deter motor carriers from working with independent contractors, to the detriment of carriers, contractors, and the broader economy that relies on the trucking industry for the efficient movement of the nation’s freight.

I. The Longstanding Use of Independent Contractors in the Trucking Industry Mutually Benefits Owner-Operators and Motor Carriers.

A. Independent Contractors Play a Crucial Role in the Trucking Industry.

The role of independent contractors in trucking operations has a history essentially as long as the industry itself. *See* Ex Parte No. MC 43 (Sub-No. 12), *Leasing Rules Modifications*, 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982) (“Prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a

large extent, ownership of these vehicles was vested in the persons who drove them, commonly referred to as owner-operators.”). Indeed, over sixty years ago, the Supreme Court noted the trucking industry’s extensive use of leased equipment supplied and operated by owner-operator truckers. *Am. Trucking Ass’ns, Inc. v. United States*, 344 U.S. 298, 303 (1953) (“Carriers ... have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands.”).

Accurate, recent estimates of the number of independent contractors and owner-operators are difficult to obtain, but there is no question that they constitute a substantial segment of the industry. The Owner-Operator Independent Drivers Association—the international trade association representing independent owner-operators and professional drivers—boasts over 160,000 members operating more than 300,000 trucks in the U.S. and Canada. *See* “OOIDA Timeline,” *available at* <http://www.ooida.com/WhoWeAre>. The Census Bureau’s 2002 Vehicle Inventory and Use Survey—the most recent comprehensive inventory of trucks nationwide—counted over 545,000 trucks primarily operated by owner-operators. U.S. Census Bureau, *2002 Vehicle Inventory and Use*

Survey 15, 39 (Dec. 2004), available at <http://www.census.gov/prod/ec02/ec02tv-us.pdf>.

For trucking companies, contractors provide a number of advantages. Independent owner-operators often are mature, experienced drivers who are highly skilled, with proven safety records, and highly motivated. The availability of such owner-operators and their equipment (through leases to carriers) enables motor carriers to save on equipment and capital costs, and provides the flexibility necessary to meet the various kinds of fluctuation in demand for cargo capacity—seasonal, geographic, sector-based, or otherwise—that are an inherent challenge for the trucking industry. As the United States Supreme Court has explained,

[d]emand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are necessary and continuing objectives. It is natural, therefore, that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then required by another carrier for its operations, and the latter will be pleased to accommodate. Each is thereby advantaged.

Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., 423 U.S. 28, 35 (1975). Independent contracting is, in other words, crucial to

the ability of motor carriers to remain nimble and competitive in the face of inevitable fluctuations in demand for their services.

B. The Independent Contracting Model Offers Owner-Operators Opportunities to Profit That Are Unavailable to Employee Drivers.

Independent contracting provides significant advantages to owner-operators as well. By successfully and skillfully managing operations, an independent owner-operator grows his or her own business, whether by productively performing services him or herself, or by hiring employees to provide additional services. *See, e.g.,* Philip J. Romero, *The Economic Benefits of Preserving Independent Contracting* 30 (Sept. 2011), available at <http://www.cbirt.org/wp-content/uploads/2012/04/Final-Romero-Report.pdf>. For the owner-operator, this arrangement provides a number of advantages compared to employment with a motor carrier.

For one thing, studies show high levels of satisfaction among independent contractors generally. As one survey concluded, the vast majority of independent workers affirmatively chose that path, with “[o]nly 1 in 7 report[ing] that the decision to work independently was due to factors beyond their control.” MBO Partners, *The State of Independence in America: Third Annual Independent Workforce Report* 6 (Sept. 2013),

available at http://info.mbopartners.com/rs/mbo/images/2013-MBO_Partners_State_of_Independence_Report.pdf. The survey concluded that “the average independent has been walking this path for over 10 years,” and that they are “getting what they want,” with some 77% reporting that they intended to maintain an independent course, and 64% rating their satisfaction as 8 or higher on a 10-point scale. *Ibid. See also* Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements* 4 (February 2005), *available at* <http://www.bls.gov/news.release/conemp.nr0.htm> (“Fewer than 1 in 10 independent contractors said they would prefer a traditional work arrangement.”).

Beyond this cross-industry satisfaction with independent contracting, owner-operators reap benefits that arise from long-standing practices in the trucking industry. For example, owner-operators typically outearn similarly situated employee drivers by a significant margin: as one industry expert stated, “the average owner-operator fares better than company driver counterparts,” with a net income of \$51,912 compared to “about \$40,000 per year for the same amount of work” by an employee driver. Rip Watson, *Owner-Operators Make Modest Income*,

Freight-Rate Gains, Industry Expert Says, Transport Topics, Sept. 23, 2013, at 12.

But independent truckers have the opportunity to do far more than simply make more money by personally hauling freight. Because business start-up costs in the trucking industry are comparatively modest (consisting principally of the cost of purchasing or leasing a power unit and various licensing and insurance fees) trucking provides an affordable opportunity to start and build their own businesses. Entrepreneurial owner-operators can purchase additional trucks and trailers, and employ drivers and other staff to carry out and expand their businesses. Independent contracting in the trucking industry allows owner-operators to be their own bosses, and to nurture their own enterprises. Indeed, some of today's largest trucking companies grew from a single-truck operation. *See, e.g.*, Prime Inc. Company History, <http://www.primeinc.com/company-history>.

Owner-operators also benefit from the fact that trucking companies have long recognized the value of having experienced drivers who understand company practices and the requirements imposed by regulations and customer demands. Faced with chronic shortages of such

experienced drivers, trucking companies often offer a variety of programs and inducements to promote the viability and stability of the owner-operator workforce and to attract new operators and equipment to the trucking industry. This has been particularly true in recent years, as a shortage of experienced drivers has become one of the greatest challenges faced by the motor carrier industry nationwide—and one that shows signs of growing even more acute in the years to come. *See, e.g.,* Mamata Badkar, *There's a Huge Shortage of Truck Drivers in America*, Business Insider (Aug. 4, 2014), *available at* <http://www.businessinsider.com/americas-truck-driver-shortage-2014-7>; B. Costello & R. Suarez, *Truck Driver Shortage Analysis 2015*, *available at* <http://www.trucking.org/ATA%20Docs/News%20and%20Information/Reports%20Trends%20and%20Statistics/10%206%2015%20ATAs%20Driver%20Shortage%20Report%202015.pdf>. Such programs can include assisting owner-operators in locating financing for their trucks, or helping them obtain lower-cost insurance than they might be able to find on their own.

The acute driver shortage also means that an employee-driver position is available to virtually any qualified individual who wants one: in-

deed, many motor carriers have been increasing driver pay, signing bonuses, and other incentives in order to attract and retain employee drivers. *See, e.g.*, Sean Kilcarr, *New Solutions Being Aimed at Driver Shortage*, Fleet Owner (Aug. 4, 2014), *available at* <http://fleetowner.com/fleet-management/new-solutions-being-aimed-driver-shortage>; Michael Calia, *Con-Way Beefs Up Driver Pay Packages for Freight Carrier*, Wall Street Journal (Sept. 30, 2014), *available at* <http://online.wsj.com/articles/con-way-beefs-up-driver-pay-packages-for-freight-carrier-1412087980>; Lynn Adler, *Companies Pile on Perks to Keep Drivers Truckin'*, Reuters (Aug. 10, 2012), *available at* <http://www.reuters.com/article/2012/08/10/uk-usa-truckers-shortage-idUSLNE87900X20120810>. It stands to reason, then, that drivers who choose independent contracting do so not out of economic compulsion or lack of other options, but because they want to try to reap the potential advantages of contracting over employment.

II. The ALJ's Erroneous Holding That Misclassification, Standing Alone, Violates the NLRA Creates a Massive Incentive Against Use of the Independent Contracting Model.

The “misclassification-as-violation” theory adopted by the ALJ’s decision, if allowed to stand, will strongly discourage the win-win arrange-

ments described above, despite Congress’s express decision to place independent contractor relationships outside the scope of the NLRA. *See* 29 U.S.C. § 152(3).

The question whether a given worker is an independent contractor or an employee is often a difficult one—and always highly fact-bound—leaving plenty of opportunity for good-faith mistakes, and for reasonable adjudicators to reach different conclusions. *See, e.g., NLRB v. United Ins. Co.*, 390 U.S. 254, 258 (1968) (recognizing that “[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor”) The difficulty of even clearly ascertaining the principles that govern application of the common-law factors is vividly illustrated by the long-standing tug-of-war between the Board and the courts on how to approach classification under the NLRA. *See, e.g., FedEx Home Deliver v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017); *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

The problem is particularly acute in the trucking industry, where federal regulations require a motor carrier engaging the services of an independent owner-operator to ensure the owner-operator’s compliance

with a host of federal regulations.¹ While the regulations themselves indicate that these requirements are not intended to bear on the classification question, *see* 49 C.F.R. 376.12(c)(4), a carrier's efforts to comply can paint a misleading picture of control over the owner-operator. As a result, it is not uncommon for a motor carrier and owner-operator to believe *ex ante*, in complete good faith and with good reason, that their relationship is that of an independent contractor, only to learn *ex post* that the relationship should have been classified as employment under the NLRA (or, for that matter, under any of the many other statutes—

¹ The regulatory context in which trucking operations are conducted includes, among others, safety, maintenance, and inspection rules; rules relating to receipts and bills of lading; equipment standards; placarding standards; leasing regulations; hours-of-service regulations; commercial driver's license standards; driver training regulations; driver qualification standards; requirements relating to minimum financial responsibility and insurance; rules relating to notification and reporting of accidents; rules governing drug and alcohol testing; and rules governing the identification and handling of hazardous materials. *See* 49 C.F.R. §§ 373, 376, 380, 382, 383, 385, 387, 390, 391, 392, 393, 395, 396, 397, 399.

There also are many additional regulations that apply to particular segments of the trucking industry. For example, transporters of household goods are subject to estimating rules; rules regulating weighing practices, reasonable dispatch, insurance for public liability and cargo, annual performance reports, packing and unpacking, shipping documentation, and dispute settlement; and regulations governing lease and interchange of vehicles. *See* 49 C.F.R. § 375.

federal and state—that depend on the employee/independent contractor distinction).

The decision below, however, greatly amplifies the risk a motor carrier faces when contemplating an independent contractor arrangement with an owner-operator. The “misclassification-as-violation” standard adopted by the ALJ leaves no room for a motor carrier’s good-faith misjudgments, and automatically subjects them to the threat of liability for unfair labor practices. Such a standard will inevitably have a serious chilling effect on motor carriers’ willingness to engage owner-operators as independent contractors. One consequence will be to limit the opportunities for entrepreneurial owner-operators to expand their businesses by providing carriers with freight-hauling services. Another will be the harm to the broader economy—which relies overwhelmingly on trucks to deliver everything from raw materials and agricultural products to consumer goods—by making it riskier to take advantage of the capacity-shifting efficiencies of the owner-operator model. *See American Trucking Associations, American Trucking Trends 2017* at 5 (in 2016, trucks moved 70.6% of gross domestic tonnage, representing 79.8% of the nation’s freight bill).

Most importantly, all of these adverse consequences would fly in the face of Congress's affirmative choice to remove independent contractors from the scope of the NLRA, 29 U.S.C. § 152(3), by chilling a model Congress specifically acted to preserve. The Board should decline the former General Counsel's invitation to do so.

CONCLUSION

The Board should reject the position of the ALJ below that misclassifying an employee as an independent contractor, standing alone, constitutes a violation of Section 8(a)(1) of the National Labor Relations Act.

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Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that on April 30, 2018, I caused a copy of the brief of *amicus curiae* American Trucking Associations, Inc., in Case No. 15-CA-184006 to be electronically filed via the NLRB E-Filing System and served upon the parties by electronic mail as follows:

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